

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PORTLAND MUSEUM OF ART,

Employer,

and

**TECHNICAL, OFFICE &
PROFESSIONAL UNION, LOCAL 2110,
UNITED AUTOMOBILE WORKERS**

Petitioner.

Case No. 01-RC-266534

**PORTLAND MUSEUM OF ART'S REQUEST FOR REVIEW
OF REGIONAL DIRECTOR'S DECISION**

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INTRODUCTION

The Portland Museum of Art (“PMA” or the “Museum”) respectfully requests review of the Regional Director’s November 9, 2020, Decision and Direction of Election (the “Decision”) that, in relevant part, determined that one classification of employees—Gallery Ambassadors—were not statutory guards as defined in 29 U.S.C. § 159(b)(3). The Gallery Ambassadors’ classification resulted from PMA’s combining of two positions in August 2020: Gallery Officers, who were the Museum’s gallery-based security guards, and Visitor-Member Experience Ambassadors, who filled a more customer-service oriented role in the galleries. [Decision at 3; Tr. 38 (Henry).] This shift, part of the Museum’s Gallery Ambassador Program (“GAP”), sought to give former Visitor-Member Experience Ambassadors an additional security role (with a commensurate increase in hourly pay) and provide Gallery Officers with additional educational tools, as part of an effort to create a public-facing guard force that had a more welcoming presence, similar to the philosophies behind community policing. [Decision at 3; Tr. 84 (Henry); 104 (Jones).] Thus, following the change, the Museum’s Gallery Ambassadors fulfill the dual role of enhancing visitor experience while maintaining security throughout the Museum. [Tr. 21, 38, 64 (Henry), 112 (Jones).]

In determining that the Gallery Ambassadors were not statutory guards, the Decision misapplies longstanding and well-settled National Labor Relations Board (“Board”) precedent in three ways. First, the Regional Director applies a test relying on whether security functions constitute the “bulk” of overall duties—a test that the Board has expressly rejected. *E.g.*, *Boeing Aircraft Co.*, 328 NLRB 128, 131 (1999); *Wright Memorial Hosp.*, 255 NLRB 1319 (1980). Second, to the extent that the Decision concludes that the Gallery Ambassador’s guard-like functions are “incidental” to their position, that conclusion is both a factual error and a

misapplication of prior Board decisions. Third, the uncontroverted evidence in the record demonstrates that Gallery Ambassadors regularly interchange with Security Associates, further evidence of their guard status. To the extent that the Decision concludes otherwise, this was also in error. Given the departure from settled Board cases and the prejudicial errors of fact, PMA respectfully requests that the Board grant review of the Decision pursuant to 102.67 of the Board's Rules and Regulations, reverse the Regional Director's Decision with respect to the Gallery Ambassadors, and hold the Gallery Ambassadors to be statutory guards within the meaning of Section 9(b)(3).

FACTUAL BACKGROUND

The Portland Museum of Art is a non-profit corporation located in Portland, Maine. Two classifications of PMA's employees provide security for the museum premises and collection – Security Associates and Gallery Ambassadors—both of which are in the Museum Experience and Safety Department. [Tr. 13-16, 61 (Henry).] There are only seven Security Associates employed at PMA, and when they are on duty, they are assigned to one of four locations: (1) the security hub, which is the centralized control room displaying monitors with live surveillance throughout and around the Museum; (2) the loading dock which is the rear entrance to the Museum through which employees, artwork, and other deliveries are received; (3) the front desk of the Museum where visitors enter, and (4) throughout the Museum, on patrol. [Tr. 27, 39 (Henry); Tr. 97 (Jones)]. Security Associates working in the security hub review surveillance footage and, depending on the location, will radio to either a Gallery Ambassador or another Security Associate if they see a security issue. [Tr. 39 (Henry).] The Security Associates wear blue shirts and black pants, identification badges, and carry two-way radios while on duty. [Tr. 39 (Henry).]

In August 2020, after years of planning, PMA implemented the changes to create the GAP. The effect of the changes was to restructure several departments and create a new Gallery Ambassador classification that combined two former positions, Gallery Officers, the Museum's gallery-based security positions, and the Visitor-Member Experience Ambassadors, who performed visitor-service type duties in the galleries. [Tr. 28–29, 46, 69 (Henry); Tr. 92 (Jones).] In recognition of the additional security functions and training that would be required, when PMA combined the two positions in August 2020, the Museum raised the previous Visitor-Member Experience Ambassadors' hourly rates of pay to match what the then-Gallery Officers had been earning. [Tr. 46–47 (Henry).] The objective of the program was to provide security in a way that appeared less authoritative and more welcoming to the visitor. [Tr. 28 (Henry).] Like Security Associates, Gallery Ambassadors receive three-day intensive security training on the policies and procedures in the Security Manual, as well as mandatory training on de-escalation techniques, active shooter training, training on emergency response, First Aid, and CPR. [Tr. 41 (Henry); 91 (Jones).] Although, due to the recency of the change, not all Gallery Ambassadors have been fully trained on the security aspect of their role, the Museum expects to complete training for all Galley Ambassadors before the end of the year. [Tr. 98–100 (Jones).]

Gallery Ambassadors are posted throughout the Museum in galleries, at the front desk, the front entrance of the Museum, in the call center, and in the Museum store. [Tr. 43 (Henry).] Additionally, Gallery Ambassadors are cross-trained with Security Associates—with the exception of disabling alarms. [Tr. 38–39, 46 (Henry); 97, 99 (Jones).] Because Gallery Ambassadors are cross-trained and because the Museum only has seven Security Associates, Gallery Ambassadors are regularly posted to the loading dock, security hub, the front desk, or patrolling the museum, positions in which the Gallery Ambassadors function entirely as Security

Associates. [Tr. 38 (Henry), 97–98 (Jones).] When Gallery Ambassadors are stationed at the loading dock, their duties include conducting “bag checks” on other employees entering and leaving the building. [Tr. 21–22, 27, 38 (Henry).] Similarly, when Gallery Ambassadors are assigned to patrol the galleries, their duties may include enforcing restrictions on access to closed galleries by other employees during the installation of new artwork. [Tr. 47 (Henry).]

In many contracts with PMA, lenders of art (including, for example, other museums or private collections) require security personnel to be within a certain proximity of the artwork or exhibit. [Tr. 48–49, 115 (Henry); Employer Ex. 11.] Before the GAP, Gallery Officers and Security Officers were used to fulfill the role, and after the GAP, PMA relies upon Gallery Ambassadors as well as Security Associates to fulfill these contractual obligations. [Tr. 48–49, 115 (Henry); Employer Ex. 11.] When certain contracts or exhibitions require 24-hour security, PMA fills night shifts interchangeably with either Security Associates, Gallery Ambassadors, or both. [Tr. 20, 40 (Henry).] In assuming the role of the former Gallery Officers, the Gallery Ambassadors are the Museum’s eyes on the ground and first line of defense in security terms. [Tr. 44–45 (Henry).] In the galleries, the Gallery Ambassadors protect PMA’s collection by, among other things, guarding the galleries, “maintaining the security of the artworks in the space, and the safety of the visitors in the space,” including, for example, ensuring that visitors do not touch or come too close to the artwork or bring prohibited items like food or drink into the galleries. [Tr. 21, 38, 64, 72–73 (Henry); 94, 112–113 (Jones).] This function is also reflected in the Gallery Ambassador Job Description, which references both security and visitor experience duties, including the following security-related functions:

- “Monitors visitors in museum areas to provide smooth flow of visitation, while **keeping artwork and visitor safety as main priority.**”

- **“Enforces all museum guidelines and safety protocols** in a friendly manner and proactively addresses visitor needs and concerns.”
- “Promptly responds to emergency situations such as fire, evacuation, and medical emergencies.”
- **“Ability to assert oneself when needed in order to enforce policies and protect artwork.”**
- “Reports any artwork incidents, visitor feedback, and gallery observations to supervisors. Promptly reports any hazardous conditions in the galleries.”

[Tr. 18 (Henry); Employer Ex. 3 (emphasis added).]

The GAP intentionally mirrored changes that were happening in cities and states around the country to focus on modern policing philosophies through enhanced “community policing,” which focuses on building ties and working closely with members of the community to enhance the police security and enforcement roles. [Tr. 13, 84 (Henry).] As described by Elena Henry, the Museum’s Deputy Director and Chief Financial Officer, to whom the Security Team reported for nearly ten years and who drafted the Gallery Ambassador position description,

The motivation [of the GAP] was to have the same security function, the same protection, but to have it be more of a welcoming presence. So to shift from this more authoritative presence that a Security Officer with the officer title, and uniform, and you know, the way they work. The security, to shift it to something similar like community policing, or friendly, or welcoming. So it wasn’t about taking away the function, but about making sure that the new ambassadors were presented to the public as a welcoming, accessible person, who could interact with the visitors while doing security.

[Tr. 84 (Henry).] This is consistent with how PMA described the concept of the GAP to its staff.

As early as August, in an all-staff announcement, PMA described the intent as “[m]aintain[ing] security and safety of visitors as [a] first priority, but design[ing] a dual role that will complement each other: monitoring visitors is easier to do when you are engaged directly with them.” [Tr. 91–92 (Jones); Employer Ex. 10.] In practice, both Gallery Ambassadors and

Security Associates share supervision between three managers—the Security Manager, and two Museum Experience and Safety Managers. [Decision at 2; Tr. 31 (Henry).]

PROCEDURAL HISTORY

The Technical Office and Professional Union, Local 2110 United Automobile Workers’ (the “Union”) filed a certification petition (the “Petition”) to certify it as the representative of a wall-to-wall bargaining unit comprised of all employees, excepting managers and supervisors as defined in the National Labor Relations Act (the “Act”). The Board Agent *sua sponte* raised the inquiry to both the Union and the Employer of whether any employees in the Union’s proposed wall-to-wall unit would be considered guards as defined in Section 9(b)(3) of the Act. The Museum responded that two classifications of employees, Security Associates and Gallery Ambassadors, met the definition of guards under Section 9(b)(3). The Union responded that no Museum employees were statutory guards. A Preelection Hearing was held in which two witnesses for the Employer detailed the security functions of both classifications of employees. The Union did not provide any witnesses or proffer any evidence in support of its position.

Following the hearing, the Regional Director issued his Decision, concluding that Security Associates were guards under Section 9(b)(3), but that Gallery Ambassadors were not. (Decision at 1.) The Regional Director focused on the visitor-service aspects of the Gallery Ambassadors’ role to the exclusion of the security functions. (Decision at 3–4.) In his limited analysis, the Regional Director determined that Gallery Ambassadors “generally do not engage in guard-like functions,” and focused on the “bulk” of their duties as being related to visitor-service and, therefore, were not statutory guards.

ARGUMENT

Section 9(b)(3) defines a “guard” as “any individual employed . . . to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer’s premises.” The Board has interpreted enforcement of rules “very broadly,” to include reporting rule infractions to a supervisor even where “no element of personal confrontation is involved.” *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 327 (8th Cir. 1987) (citing *Wright Memorial Hosp.*, 255 NLRB 1319 (1980); *M.G.M. Grand Hotel*, 274 NLRB 139 (1985); and *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB 1363 (1983)). Nor does the Board require any specific accounting or percentage of overall guard duties: “[O]f central concern in such cases is not a numerical accounting of the percentage of time employees spend on such duties, but rather the specific nature of the duties themselves.” *Boeing*, 328 NLRB at 130 (citing *Rhode Island Hosp.*, 313 NLRB at 346). In applying this statutory definition, the Board will find that employees are statutory guards unless security functions are only an incidental part of their overall responsibilities. *Boeing Aircraft Co.*, 328 NLRB 128, 131 (1999) (citing *Rhode Island Hosp.*, 313 NLRB at 347).

The nature of “[t]raditional guard responsibilities,” as the Board has defined them, include traditional police-type or security functions, such as “enforc[ing] rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer’s premises; and wearing guard-type uniforms or displaying other indicia of guard status.” *Id.* None of these factors, on their own, are dispositive, but are considered in the totality. *Hope Institute for Children & Families*, Case No. 25-RC-085832, 2012 WL 12068820, at *5 (DCNET Aug. 28, 2012). “Although the Board uses

the phrase ‘traditional police and plant security functions,’ it has not required employees to look like guards by wearing a uniform and possessing a weapon to be guards within the meaning of the Act.” *Id.* (citing *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB 1363, 1364 (1983)). Nor does the Board look to “indicia of guard status” such as the use of a title of “guard” or “security” as sufficient, standing alone, to be dispositive of guard status. *Id.*; *Ford Motor Co.*, 116 NLRB 1995 (1956). Contrary to these decades old and well-settled principles of law, the Decision selectively emphasizes only the non-guard functions and relies on legal analysis that the Board has expressly rejected.

I. The Regional Director’s Decision applied an incorrect test—inquiring into the “bulk” of Gallery Ambassadors’ duties—which the Board has expressly rejected.

The Regional Director’s Decision looks to whether the Gallery Ambassadors’ guard duties constitute “a significant portion” or the “bulk” of their duties in analyzing whether they are guards. (Decision at 5, 6.) In so doing, the Regional Director applied a test that the Board has expressly rejected. *Boeing*, 328 NLRB 128, 131 (1999); *Rhode Island Hosp.*, 313 NLRB 343, 347 (1993). Assuming for the sake of argument that Gallery Ambassadors primarily engage in visitor-service functions, which the Employer disputes, the Board has made clear that it is not the amount, but the nature of the employees’ duties that is dispositive of their guard status.

Boeing, 328 NLRB at 130; *Rhode Island Hosp.*, 313 NLRB at 346.

“In a great many cases, as here, an employer will charge certain employees with duties that are arguably security-related *for only a portion of their working hours.*” *Boeing*, 328 NLRB at 130 (emphasis added). Such a fact does not negate guard status of those employees. Rather, “It is the *nature* of the duties of guards and not the percentage of time which they spend in such duties which is controlling.” *Rhode Island Hosp.*, 313 NLRB at 346 (emphasis added). In an

early case on this issue, the Board addressed the question of whether an employee who spends only 25% of his or her time performing guard duties should be considered a “guard” under Section 9(b)(3). *Walterboro Manufacturing Corp.*, 106 NLRB 1383, 1384 (1953). In evaluating this question, the Board looked to the purposes of Section 9(b)(3):

An employee who spends only part of his time [engaged in guard duties] will, of course, be in a position where the conflict between his loyalty to fellow union members and to his employer will exist only part of the time. But the policy considerations which prompted the special treatment of “guards” are as applicable to part-time as to full-time guards.

Id.; see also *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 326–27 (8th Cir. 1987) (“It is the obligation to protect the employer’s property combined with the responsibility to enforce rules against fellow employees which create the potential for divided loyalty that Congress sought to avoid in Section 9(b)(3).”).

The Regional Director erroneously concludes that the “bulk of [Gallery Ambassadors’] duties” consists of non-guard functions by selectively highlighting only those responsibilities that include visitor-service functions. (Decision at 6.) In support of the analysis, the Decision cites *Reynolds Metal Company* for the proposition that employees will be considered guards “where a portion of their time, and a significant portion of their job, is spent performing guard duties” (Decision at 5 (citing *Reynolds Metals Co.*, 198 NLRB 120, 120 (1972).) But the reference in *Reynolds Metals Company*’s decision to a “significant portion” of employees’ work is inapposite to this case. *Id.* In *Reynolds Metal Company*, unlike here, the Board certified a guard unit two years earlier without including firemen, concluding that they did not meet the requirements to be considered statutory guards. *Id.* Later, a spate of theft and vandalism at the plant required the employer to task the firemen with greater guard-like functions, together with the plant’s security guards. *Id.* at 120–21 (emphasis added). The employer sought clarification

of the unit with the significant changes to the firemens' duties, and the Board agreed with the employer. *Id.* As the Board concluded, the firemen's duties had materially changed since its last decision, and the repeated reference to the term "significant" related to the *change* in their duties, which merited reevaluating their guard status. *Id.* at 120–21.

In sum, *Reynolds Metals Company* does not stand for the proposition that employees are considered guards only if a "significant portion" or the "bulk" of the duties are guard functions. (*Cf.* Decision at 5, 6.) The Board has never looked to the bulk of an employees' duties—whether in terms of time or overall functions—to find guard status under Section 9(b)(3); To the contrary, the Board has flatly rejected such an approach. *Boeing*, 328 NLRB at 131; *Wright Memorial Hospital*, 255 NLRB at 1320. If the "bulk of the duties" were the test for guard status, the Board would have rejected guard status for the shuttle van drivers in *Rhode Island Hospital*, 313 NLRB at 347, or the ambulance drivers in *Wright Memorial Hospital*, 255 NLRB at 1320, the bulk of whose duties were transporting patients or employees. The watchmen in *Walterboro Manufacturing Corp.* would not have been guards, as the Board found that only 25% of their duties were guard-like functions, and the bulk were "maintenance work in the plant." 106 NLRB at 1384. None of the numerous cases addressing firefighters would result in a finding of guard status, as the "bulk" of their duties were watching for or fighting fires, to state just a few examples. *McDonnell Aircraft Co.*, 827 F.2d at 329; *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991); *Chance Vought Aircraft*, 110 NLRB 1342 (1986); *Reynolds Metals Co.*, 198 NLRB at 120–21.

In addition to the factual error in the Regional Director's finding regarding the "bulk" of Gallery Ambassadors' activities in this case, which is addressed in Section II, *infra*, the Regional Director's selective reliance on the visitor-service functions, combined with the focus on

whether those functions were “a significant portion of” or the “bulk” of the Gallery Ambassadors’ functions, misapplies and cuts against longstanding Board decisions applying Section 9(b)(3). The Decision creates an apparent conflict and raises a substantial question of law for which the Employer respectfully requests review.

II. To the extent that the Decision implies that the Gallery Ambassadors’ guard functions were “incidental,” the Regional Director departed from well-settled Board precedent.

Because the Board looks to the “nature” of an employee’s guard-type activities, rather than the extent to which the employee engages in them, in determining whether Gallery Ambassadors are “guards” within the meaning of Section 9(b)(3), the Regional Director should have concluded that they are statutory guards. Even if guard functions are not the “bulk” of an employee’s work, if enforcement of rules or engaging in guard functions are “regular” duties, rather than being performed “only incidentally,” guard status applies. *Boeing*, 328 NLRB at 131. The record clearly demonstrates that the guard functions of the Gallery Ambassadors in this case are far more than “incidental” as the Board has defined it. To the extent that the Regional Director found otherwise, that finding is clearly erroneous.

In *Burns Security Servs.*, the Board specified that the definition of “incidental” is “being likely to ensue as a chance or minor consequence”; in other words, that security duties are of “a relatively minor consequence of their [overall] responsibilities.” 300 NLRB 298, 301 n.19 (1990) *overruled by BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991) (quoting Webster’s New Collegiate Dictionary, 9th Ed. (1983)). In *Burns*, for example, the Board found that where firefighters’ enforcement of rules was limited to enforcement of fire safety rules and reporting unsafe conditions, the guard duties were “incidental” to the employees’ roles as firefighters. 300 NLRB at 301–02. The Eighth Circuit reversed this decision, however,

concluding that in inspecting for fire hazards, enforcing no-smoking policies, and ensuring that employees' "hot" work (such as welding) was performed in compliance with fire safety policies, the guard duties were more than incidental and the firefighters were guards. *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 525–26 (8th Cir. 1991).

A. The record evidence is clear that Gallery Ambassadors engage in far more than "incidental" guard functions.

There is no support for the Regional Director's determination that Gallery Ambassadors "do not engage in guard functions." (Decision at 6.) Contrary to the Regional Director's determination, the record evidence is that most Gallery Ambassadors on any given day are posted to the galleries where they are responsible for enforcing Museum rules against patrons and other employees, and performing security functions. [Tr. 95 (Jones); Employer Ex. 9.] Gallery Ambassadors carry two-way radios that enable them to communicate with other members of the security team to carry out and respond to security issues. [Tr. 39–40 (Henry).] In practice, Gallery Ambassadors and Security Associates share management from any one of three managers, as all three assign work, provide performance reviews, and make hiring decisions as a group. [Tr. 32–33 (Henry); Employer Ex. 1, 4.] Gallery Ambassadors regularly work night shifts at the Museum when the Museum is closed during times when around-the-clock security of the Museum is needed. [Tr. 78, 83 (Henry); 100 (Jones).] The Museum's Security Manual, which includes the Museum's policies on staff access to art storage rooms, after-hours entry for authorized staff, vandalism to collections, break-ins, dangerous situations, and emergencies, was the basis for an intensive, three-day training provided to both Security Associates and Gallery Ambassadors. [Tr. 90–91 (Jones); Employer Ex. 7 at 19–21, 26.] As part of the security team, Gallery Ambassadors also receive mandatory training on de-escalation

of conflicts, active shooter training, and training on emergency response, first aid, and CPR. [Tr. 41 (Henry).]

On any given day, Gallery Ambassadors serve a variety of roles throughout the Museum, which was shown by way of example through the September and October 2020 schedules for Gallery Ambassadors, and the witnesses provided uncontroverted testimony describing these roles. [Tr. 38 (Henry), 95 (Jones); Employer Ex. 9.] As the Schedule reveals, most Gallery Ambassadors are in the galleries, typically five or six at a time, while one Gallery Ambassador is assigned to the store, one as a Greeter at the Museum entrance, one posted to a position entitled “A-B-G click,” one as a “Float,” and two in the Call Center. [Tr. 95 (Jones); Employer Ex. 9.] Elizabeth Jones, the Museum’s Deputy Director and Director of External Affairs, who is also the head of the Museum Experience and Safety Department, described the Gallery Ambassadors’ duties when they were assigned to the galleries:

Q: [W]hat tasks would be required to be performed, by the people who are assigned in the galleries, on Exhibit 9, page seven?

A: Gallery Ambassadors would be responsible for maintaining security of the artworks in the space, and the safety of the visitors in the space, as well as the employees.

[Tr. 112 (Jones).] In the galleries, Gallery Ambassadors monitor both visitors and staff, to watch for security issues, and to ensure that “staff are not doing the wrong thing, such as going through the galleries with coffee, with beverages and food.” [Tr. 21, 398 (Henry).] Similarly, in response to questions about the Greeter role, Ms. Jones explained that

[The greeter] is a new position. When [the Museum] reopened on June 17th . . . we needed someone at the front doors, to make sure that visitors were wearing masks, and had a ticket to come in, because everything is a time ticket at this point, to maintain capacity, due to State regulations. So that greeter position is the first person, that anyone comes into contact with. And they’re responsible for making sure that policies and procedures are adhered to, such as wearing a mask

and having a ticket. And if they don't they have the authority to turn those individuals away.

[Tr. 102 (Jones).] Ms. Henry noted that the Greeter "mak[es] the place seem welcoming, and the first experience of the visitor with the Museum. Setting the tone for the first experience, and enforcing the COVID rules." [Tr. 64 (Henry).] Even absent the COVID-19 pandemic, the Greeter ensures that visitors have bought tickets before they come in. [Tr. 66 (Henry).] The "A-B-G click" role, in which Gallery Ambassadors also serve on certain shifts, "monitor[s] the capacity for the special exhibition, which [PMA] ha[s] to adhere to by State guidelines, to make sure that there's not too many people in the space at one time." [Tr. 101 (Jones).] Further, as stated during the hearing, "if there are too many people in there, does [the Gallery Ambassador] have the authority to tell people they can't go in? A: Correct." [Tr. 101 (Jones).] When posted to these stations, Gallery Ambassadors are not permitted to leave unless another person has arrived to relieve them, which they may radio to request. [Tr. 27 (Henry).] The Gallery Ambassador assigned to the float position, as the name suggests, serves to relieve others who need to use the restroom or have a break. [Tr. 27 (Henry); 101 (Jones).]

Before the GAP, Gallery Officers were assigned to all posts that Gallery Ambassadors are currently assigned to, except for the front desk, the store, and the call center. [Tr. 44 (Henry).] Although Gallery Ambassadors also take shifts in the call center, which involves answering phones and talking to visitors or members, and working in the store, which includes cashier duties, there are only three shifts at any given time with these duties, with at least eight other Gallery Ambassador shifts on any given day posted to galleries, as a greeter, or in the float position, involving direct security functions and enforcement of Museum rules. [Tr. 95 (Jones); Employer Ex. 9.] In addition to the eight other shifts, there are regularly two to three other Gallery Ambassadors serving entirely in the role of Security Associates, posted to the loading

dock, the security hub, or the front desk. In those shifts, for example, Gallery Ambassadors enforce Museum rules against employees by searching employees' bags exiting through the loading dock to ensure that they do not leave the Museum with art or other unauthorized items. [Tr. 27–28 (Henry).] *See Am. Bldg. Maintenance Co.*, 126 NLRB 185 (1960).

That the Gallery Ambassadors also serve a kind of visitor-service function does not negate their guard status. The Regional Director points to the Union's citation of *55 Liberty Owners Corp.*, indicating that Gallery Ambassadors are analogous to the doormen in the apartment buildings at issue, that case is inapposite to the employees at issue here. 318 NLRB 308 (1995). One key factor that distinguishes the elevator operators and the doorpersons in the *55 Liberty Owners Corp.* case, the lack of any evidence that their presence supported Congress' aims to "protect the employer's property combined with the responsibility to enforce rules *against fellow employees*, which create the potential for divided loyalty that Congress sought to avoid in Section 9(b)(3)." *McDonnell Aircraft Co. v. NLRB*, 827 F.2d at 326–27. That is not the case here. Unlike the doorpersons in *55 Liberty Owners' Corp.*, the Gallery Ambassadors are empowered and expected to protect the Museum property and enforce rules against both employees and patrons. Further, unlike the doorpersons, in which the Board found "no other evidence that the doorpersons enforce rules against employees or other persons" apart from asking unauthorized persons to leave or not smoke, there *is* evidence in this case that Gallery Ambassadors do significantly more than ensure that people are authorized to enter the galleries. *Id.* at 310. Lastly, unlike the *55 Liberty Owners* employees, Gallery Ambassadors actually do receive training in security, [Tr. 91 (Jones)],¹ they make rounds and work nights for building

¹ Although the Union attempts to make an issue of the fact that the Security Manual was not distributed to Gallery Ambassadors in their three-day training, and has not been updated, the reason is simple and obvious. The Museum has not yet updated the Manual with its new classifications and therefore did not want to distribute it in

security, [Tr. 100 (Jones)], and they enforce rules against their fellow employees and Museum patrons, [Tr. 112–13 (Jones.)]. *Cf. id.* The evidence in the record is clear that Gallery Ambassadors engage in far more than “incidental” or “minor” guard functions against danger to the art collection and other property potentially posed by employees and visitors.

B. In suggesting that Gallery Ambassadors’ enforcement of rules together with other employees refutes their guard status, the Decision further departs from settled Board precedent.

Additionally, in two parts of the Decision, the Regional Director relies on evidence that Gallery Ambassadors did not act alone in enforcing Museum rules to support a determination that they were not guards. (Decision 4, 6.) However, the Board precedent is well settled even acting in coordination with other security guards or employees by reporting of safety issues or rule violations to other security personnel is sufficient to support a finding that an employee is a “guard” as defined in Section 9(b)(3).

In *Rhode Island Hospital*, the Board relied on van drivers’ responsibilities to “look out for and report[] security problems or rule violations” on the employer’s premises to find that the employees were guards under Section 9(b)(3). 313 NLRB at 347. The Board likened the van drivers to the maintenance employees in *A.W. Schlesinger Geriatric Center*, who—despite lacking training as guards, not wearing uniforms, or carrying firearms—regularly locked doors and gates, observed shift changes, and assured the safety of employees coming and going from work. *Id.* (citing *A.W. Schlesinger*, 267 NLRB at 1364). “The fact that they may report [safety issues or violations] to supervisors or police does not detract from their guard status. . . .

referring to the outdated classifications. This fact does not make the existence of or requirements to enforce those security policies in any way questionable.

Likewise, it is not determinative that this is not their only function.” *A.W. Schlesinger*, 267 NLRB at 1364.

Employees who monitored door exit alarms, stairwell motion detectors, and fire alarms were guards even if they never personally responded to those alarms because they were “closely involved in protecting the Employer’s property and enforcing security.” *M.G.M. Grand Hotel*, 274 NLRB 139 (1985). Where an employee’s reporting functions relate to overall security functions, the Board has found the employees to be guards. *Boeing*, 328 NLRB at 131; *M.G.M. Grand Hotel*, 274 NLRB at 140; *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB at 1364; *Wright Memorial Hospital*, 255 NLRB at 1320. In all of these cases, the dispositive factor and “[a]n essential attribute of the disputed employees’ responsibility[,] encompassed monitoring the employer’s property for security purposes and reporting any findings to others equipped to deal with them.” *Hope Institute for Children & Families*, 2012 WL 12068820, at *7 (quoting *Boeing*, 328 NLRB at 132).

Based on the Regional Director’s selective recitation of the record evidence, however, it appears that he relies upon the fact that Gallery Ambassadors responded to security incidents “by contacting managers and, possibly, a Security Associate,” in determining that they were not guards. (Decision at 4.) To the extent that the Regional Director has found that the Gallery Ambassadors relied on managers or other employees to enforce policies, it is error.² However, even assuming that the role of the Gallery Ambassadors is limited to reporting security issues to managers or Security Associates, this fact is sufficient to *support*, rather than detract from, a

² The record evidence, including the job description and the testimony, supports a conclusion that Gallery Ambassadors *are empowered to enforce rules* by excluding or removing patrons who violate PMA rules or against employees when, for example, guarding the loading dock. [Tr. 72–74 (Henry) 112 (Jones).] The Gallery Ambassadors’ Job Descriptions directly contradict the Regional Director’s finding, in requiring them to have the “[a]bility to assert oneself when needed in order to enforce policies and protect artwork.” [Tr. 18 (Henry); Employer Ex. 3.]

finding of guard status. As noted in the Board’s prior cases, to the extent that Gallery Ambassadors have reporting functions, those reports relate to overall security functions, which support a determination that they are guards. *Hope Institute for Children & Families*, 2012 WL 12068820, at *7; *Boeing*, 328 NLRB at 131; *M.G.M. Grand Hotel*, 274 NLRB at 140; *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB at 1364; *Wright Memorial Hospital*, 255 NLRB at 1320. In many ways, Gallery Ambassadors share characteristics of the coin room employees in *Brink’s Inc.*, 272 NLRB 868, 869–70 (1984). In that case, the Board found that the fact that *other guards* also controlled access to the premises, or that non-guard employees could take similar measures, did not “nullify the guard-type duties of the coin room employees,” including protecting property within the coin room, ensuring that unauthorized persons do not enter, and possessing the means to take action to protect the premises. *Id.* The coin rooms, like the galleries in the Museum, are the responsibility of Gallery Ambassadors to safeguard.

C. A determination that Gallery Ambassadors engaged in only incidental security functions is contrary industry standards.

There are further compelling reasons for review in this case because, in practical effect, museums—particularly smaller museums—regularly engage staff who provide visitor-service functions to perform important security roles that bear on the purposes for Section 9(b)(3). One key aspect of the Museum’s mission “is to protect and conserve the collection” a role that PMA does not “take . . . lightly,” [Tr. 104 (Jones)], and which is built into numerous contracts that the Museum executes with other museums or private collections who loan art or exhibitions to PMA, [Tr. 49 (Henry)]. In practical effect, the Regional Director’s Decision leaves the Portland Museum of Art with only seven “guards” to enforce Museum rules. [Decision at 6 – 7.] Security Associates alone do not and cannot provide the necessary security functions for a museum the size of the Portland Museum of Art. [Tr. 13-14, 38–39, 46 (Henry); 98 (Jones).] Gallery

Ambassadors are a central and key feature of the Museum's security team. [Tr. 64, 84, (Henry), 104 (Jones).] This is evidenced by the Museum's use of Gallery Ambassadors in ensuring the appropriate number and placement of security staff are in place according to its contracts with lenders of art, their participation in night shifts when the Museum is closed, and their regular functions in securing the galleries and public spaces. [Tr. 46–48 (Henry).] Specifically, in assuming the roles of the former Gallery Officers, the Gallery Ambassadors are the Museum's eyes on the ground and first line of defense in security terms, whether the security risk is from employees or visitors. [Tr. 44–45 (Henry).]

Other museums who use front-of-house, visitor-oriented employees to perform security functions have similarly treated those employees as statutory guards, to be represented by guard-only unions and in separate units as required in Section 9(b)(3). Harvard University Art Museum, for example, includes in its Security, Parking, and Museum Guard union Museum Attendant and Museum Attendant II classifications, in addition to Museum Guards.³ Those employees' duties and responsibilities include "provid[ing] services to visitors and colleagues, e.g. answers questions, gives directions, refers to other sources of information (i.e. Visitor Services) where appropriate" and requires them to keep informed of museum programming, in addition to enforcing policies relating to "conduct of museum visitors."⁴ Similarly, the Metropolitan Museum of Art noted in the collective bargaining agreement with the guard union, Local Union 1503, District Council 37, the classification of Assistant Maintainer, after eliminating the classifications of Associate Operations Coordinator, Senior Education Operations

³ See Collective Bargaining Agreement between Harvard University and Harvard University Security, Parking and Museum Guards' Union (HUSPMGU), *available at* https://hr.harvard.edu/files/humanresources/files/union_huspmgu.pdf (Last Accessed Nov. 20, 2020).

⁴ See Museum Attendant position advertisement, *available at* <https://lensa.com/museum-attendant-jobs/cambridge/jd/4cc5f9f84b5f966220a40978cf7d6b2b> (Last Accessed Nov. 20, 2020).

Assistant, and Education Operations Assistant, all of which were included in the museum's *Education Department*.⁵ It is not unusual for museums to employ staff who are engaged in visitor-services or educational roles to perform security functions, particularly with respect to safeguarding the collection during hours when the museum is open to the public. The Regional Director's Decision would have the practical effect of eliminating those security functions from any classification of employee with an educational or visitor-service role in a museum, an illogical result that does not comport with the purposes and plain language of Section 9(b)(3).

In sum, the Regional Director departed from controlling Board precedent in concluding that the Gallery Ambassadors "do not engage in guard-like functions." (Decision at 6.) The record clearly demonstrates that guard-like duties are far more than "incidental," as the Board has defined it. To the extent that the Regional Director implied that the Gallery Ambassadors' functions were incidental, the Decision departs from both Board decisions on this issue and from industry practice.

III. The Regional Director clearly erred in finding that Gallery Ambassadors do not interchange with Security Associates, which further supports their guard status.

Lastly, further evidence that Gallery Ambassadors are guards under Section 9(b)(3) is the fact that they are regularly assigned to posts typically covered by Security Associates, whom the Regional Director found to be statutory guards. To the extent that the Regional Director concluded that the Gallery Ambassadors serving in Security Associates' roles did not support a finding of guard status, that was erroneous and contrary to Board precedent.

⁵ See Collective Bargaining Agreement between the Metropolitan Museum of Art and the Local Union 1503 of District Council 37, available at http://local1503.org/wordpress/wp-content/uploads/2019/09/2014.07.01-2020.06.30_MuseumContract.pdf (Last Accessed Nov. 20, 2020).

- A. The Regional Director clearly erred by finding that Security Associates were always present when Gallery Ambassadors worked in posts typically covered by Security Associates.

The Regional Director found that, whenever Gallery Ambassadors worked as Security Associates for some shifts, “in practice, a Security Associate was also present when a Gallery Ambassador was so assigned.” (Decision at 4.) This finding is clear error.

Counsel for the Petitioner, in his Post-Hearing Brief, states without support almost the verbatim passage included in the decision: “Based on the schedule introduced into evidence, on those occasions when a Gallery Ambassador has been assigned to a station normally staffed by a Security Associate, a Security Associate was also present (Er. Ex. 9; Tr. 139).” [Petitioner’s Post-Hearing Brief, at 8–9.] Petitioner’s counsel cites to page 139 of the hearing transcript in support of his contention, but page 139 contains only procedural discussions of counsel regarding the post-hearing brief and election procedures unrelated to this issue. [Tr. 139.] In looking elsewhere in the record for support of this novel contention, one fares no better. Rather, review of the Employer’s Exhibit 9, the September and October 2020 schedule, contradicts such a finding. [Tr. 97 (Jones); Employer Ex. 9.] Looking at examples of the Gallery Ambassadors discussed by Ms. Jones at the hearing, Amy Hicks’s shift during the week following the hearing (beginning Sunday, October 18), the schedule shows that she is assigned to the Loading Dock on Sunday October 18, during periods of time when no other employee is scheduled, on Monday-Tuesday, October 19-20, she is assigned to the Office with no other Security Associate, and on Wednesday, October 21, she is assigned to the Front Desk with no one else. [Tr. 97 (Jones); Employer Ex. 9 at 7.] In the prior week, on Sunday, October 11, Ms. Hicks is assigned to the Loading Dock during hours when no other employee is present, and the same is true on Wednesday, October 14, when she is assigned to the Front Desk. [Employer Ex. 9 at 6.] Similarly, Dan Gifford is assigned to the Front Desk on Friday and Saturday, October 23-24,

when no other employee is assigned. [Tr. 97–98 (Jones); Employer Ex. 9 at 7.] Neither the record or the schedule supports a finding that Gallery Ambassadors worked with Security Associates when they interchanged.

The record evidence demonstrates that Gallery Ambassadors are in the process of being completely cross trained on the security protocols so that they can perform these functions interchangeably with Security Associates. [Tr. 38–39, 46 (Henry); 97, 99 (Jones).] Additionally, the Museum occasionally needs around-the-clock security with certain exhibitions. [Tr. 41, 46 (Henry).] During this time, both Gallery Ambassadors and Security Associates work the night shift patrolling the Museum when it is closed to the public. [Tr. 22, 41, 46, 83 (Henry), 98 (Jones).] Given that there are very few Security Associates—only seven for the entire museum—Gallery Ambassadors often take shifts during which they act completely in the role of Security Associates. [Tr. 38–39 (Henry), 97–98 (Jones).] There is no authority for the Union’s contention that Gallery Ambassadors are only posted to Security Associate functions when a Security Associate is present, and that proposition is contradicted by the schedule. [Employer Ex. 9.] In repeating and relying on this contention, the Regional Director’s finding is clear error.

- B. To the extent that the Regional Director concluded that evidence of interchange did not support Gallery Ambassadors’ guard status, the Decision further departs from Board precedent.

Where, as here, employees regularly serve in the role or “interchange” for employees who are guards under Section 9(b)(3), that fact is further evidence that those employees should be considered statutory guards as well. To the extent that the Regional Director concluded that the Gallery Ambassadors’ interchange with Security Associates did not support a determination of the Gallery Ambassadors’ guard status, that departed from Board cases that address this circumstance. *See Brink’s, Inc.*, 226 NLRB 1182, 1183 (1976); *Am. Building Maintenance Co.*, 126 NLRB 185, 186 (1960); *Am. Dist. Telegraph Co.*, 128 NLRB 345, 345 (1960). *Cf. Lion*

Country Safari, 225 NLRB 969, 970 (1976) (citing the lack of interchange with guards as supportive of a finding that employees were not guards).

For example, in *Brink's Incorporated*, the Board evaluated whether armored vehicle services employees classified as Couriers were guards under Section 9(b)(3). 226 NLRB at 1183. Couriers, who travel in armored vehicles with Guards, pick up bags or pouches at a customer's premises and transport them to the destinations. *Id.* Once Couriers obtained gun permits, however, they would serve in all functional capacity as guards, taking guard shifts. *Id.* at 1184. The fact that several of the Couriers were used "interchangeably" with undisputed statutory guards supported the Board's conclusion that they, too, were statutory guards under Section 9(b)(3). *Id.* 1184–85.

Similarly, in this case, because Gallery Ambassadors are cross-trained with Security Associates, with the exception of alarms and given that there are very few Security Associates, Gallery Ambassadors often serve on the schedule and take shifts acting completely in the role of Security Associates in positions where their duties include enforcement of Museum rules against both visitors and fellow employees. [Tr. 38 (Henry), 97–98 (Jones).] Although, due to the recent implementation of the GAP, some Gallery Ambassadors have not yet received the full security training, the Museum continues the training, and by the end of 2020, all Gallery Ambassadors are expected to manage these responsibilities. [Tr. 91, 98–99 (Jones).] Gallery Ambassadors are and will continue to be scheduled at the loading dock, and in that role, they also perform all the functions of the Security Associate including controlling employees' after-hours access to the Museum and conducting "bag checks" on arriving and departing employees. [Tr. 97–98 (Jones).] The ability for Gallery Ambassadors to serve in the same role as a Security

Associate is further evidence that they are trained to perform and responsible for security functions. *See Brink's, Inc.*, 226 NLRB at 1184.

CONCLUSION

There are compelling reasons for review in this case because the Decision departs from well-settled Board decisions applying Section 9(b)(3), and the Decision contains prejudicial factual errors. As a result, the Employer respectfully requests that the Board Grant PMA's Request for Review, reverse the Regional Director's Decision with respect to the Gallery Ambassadors, and hold the Gallery Ambassadors are statutory guards under Section 9(b)(3).

Dated: November 23, 2020
Portland, Maine

Respectfully submitted,

/s/ Glenn Israel

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PORTLAND MUSEUM OF ART,

Employer,

and

**TECHNICAL, OFFICE &
PROFESSIONAL UNION, LOCAL 2110,
UNITED AUTOMOBILE WORKERS**

Petitioner.

Case No. 01-RC-266534

CERTIFICATE OF SERVICE

I, Glenn Israel, an attorney, hereby certify that on November 23, 2020, caused true and complete copies of the Request for Review to be served by the methods indicated below, upon the following persons at the following addresses:

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